	FEDER 1CO 20103EP	27 PM 5: 42 Was	CLECTION COMMISSION 09 E Street, N.W. hington, D.C. 20463 RAL COUNSEL'S REPORT		
3550	12		MUR 6277 DATE COMPLAINT FILED: April 20, 2010 DATE OF NOTIFICATION: April 27, 2010 DATE OF LAST RESPONSE: June 11, 2010 DATE ACTIVATED: June 29, 2010 EXPIRATION OF BOL: Earliest March 26, 2015;		
04428	14 -15 16	COMPLAINANT:	Latest August 5, 2015 John D. Stevens		
100	17 18 19 20 21	RESPONDENTS:	Robert E. Kirkland Kirkland for Congress and Ronald H. Kirkland, in his official capacity as treasurer Ronald H. Kirkland		
	22 23 24 25 26 27	RELEVANT STATUTES AND REGULATIONS:	2 U.S.C. § 441a(a)(1)(A) 2 U.S.C. § 441a(f) 2 U.S.C. § 441a(a)(7)(B) 2 U.S.C. § 434(b) 11 C.F.R. § 109.3(b) 11 C.F.R. § 109.21		
	28 29	INTERNAL REPORTS CHECKED:	Disclosure reports; Commission indices		
	30	FEDERAL AGENCIES CHECKED:	None		
	31 32	I. <u>INTRODUCTION</u> This matter involves alleged coord	lination between Robert E. Kirkland and the campaign of		
	33	his brother, congressional candidate Ronald H. Kirkland. The complaint alleges that Robert			
	34	Kirkland spent large amounts of his own funds for public communications - reported as independent			
	35	expenditures - in support of the candidate and Kirkland for Congress and Ronald H. Kirkland, in his			
	36	. ,	ttee"). The complaint primarily asserts that Robert		
37 Kirkland's communications, and specifically his use o			ally his use of the Committee's campaign "slogan," was		

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- based on information shared with him by the candidate and the Committee. Respondents deny that
- 2 they coordinated any of the communications, and have submitted affidavits to that effect. Robert
- 3 Kirkland's response also states that the wording was generic, commonly used, and was based on
- 4 public sources. As discussed in more detail below, the explanation for how Robert Kirkland came to
- 5 use the similar content does not appear to be factually supported by the available information.
- 6 Accordingly, it these not appear that we have complete information as to how the similarities came to
- 7 exist.
- The affidavits with the responses appear to sufficiently rebut that Robert Kirkland and Brad
- 9 Greer, the political consultant for his expenditure effort, who were both volunteers with the
- 10 Committee during January 2010 when they contracted to undertake the effort, advised anyone else
- associated with the Committee of the planned expenditures in advance of their distribution.
- 12 However, they do not specifically describe what activities the two engaged in while volunteering
- with the Committee, other than generally advising the candidate (Greer) or the campaign (Robert),
- raising funds (Robert), scheduling (Greer), and making recommendations on the hiring of campaign
- staff (Greer). The affidavits also do not specifically speak to whether Robert Kirkland, or especially
- 16 Greer, who was an experienced political consultant, had any involvement with the Committee's
- 17 media strategy or the creation of its public communications. While generally denying that there
- 18 were any common vendors, there is insufficient information to determine whether Greer, while not
- 19 paid by the Committee, qualified as a common vendor and used or conveyed to Robert Kirkland
- 20 information about the Kirkland campaign plans, projects, activities or needs which was material to
- 21 the creation, production or distribution of Robert Kirkland's communications.
- The affidavits deny, with conclusory statements, that there was any suggestion or request,
- 23 substantial discussions, or material involvement between Robert Kirkland and others associated with

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1 his expenditure effort on the one hand, and the candidate and Committee staff on the other.

2 However, the affidavits do not provide sufficient factual information to allow the Commission to

3 analyze whether the conclusions are merited. Specifically, there is inadequate information to

determine whether Greer had actual authority to engage in activities involving the Committee's

5 communications, such that he was an "agent" of the Committee at the same time he was discussing

and signing a contract with Robert Kirkland to create and produce future communications. In

addition, the affedenits do not address the timing, nature, and scope of the discussions that Robert

Kirlihand and Greer had with each other in January 2010 concerning the planned future expanditures.

On balance, based on the complaint and the responses and other available information, we believe an investigation is warranted to gather facts to determine whether the communications at issue were coordinated based on Greer qualifying as a "common vendor" or as an "agent." Therefore, we recommend that the Commission find reason to believe that Robert Kirkland violated 2 U.S.C. § 441a(a)(1)(A) by making excessive in-kind contributions to the Committee in the form of coordinated expenditures, and that the Committee and Ronald H. Kirkland, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b) by knowingly accepting and failing to disclose excessive in-kind contributions. We further recommend that the Commission take no action at this time as to the candidate, Ronald H. Kirkland.

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1 II. FACTUAL AND LEGAL ANALYSIS

2 A. Factual Background

Ronald Kirkland was a candidate in the August 5, 2010 Republican primary for Congress in 3 Tennessee's Eighth District. He filed a statement of candidacy with the Commission on January 13, 4 2010. Between mid-December 2009 and February 7, 2010, Ronald Kirkland's older brother Robert 5 6 served as a Committee volunteer, advising it "on various matters" and fielping it "to raise funds." 7 Rebert Kirkland Response, Affidavit of Robert Kirkland 994-5 ("Robert K. Aff."). Between 8 December 14, 2009 and January 31, 2010, Brad Greer also served as a Committee volunteer, "assisting in scheduling, advising the candidate, and making recommendations on the hiring of 9 10 campaign staff." Robert Kirkland Response, Affidavit of J. Bradley Greer ¶3 ("Greer Aff."). 11 On January 21, 2010, Robert Kirkland signed a contract with Greer, whereby Greer agreed to 12 serve as a consultant to an "independent expenditure effort" to be financed by Robert Kirkland. 13 Robert K. Aff. ¶7. In addition to hiring Greer, Robert Kirkland retained legal counsel to advise him on his independent expenditure effort. Id. at ¶6. Robert Kirkland's April Quarterly Report of 14 15 Independent Expenditures (FEC Form 5) shows an initial \$10,000 payment on February 1, 2010, to the law firm of his current coursel, followed by a first payment to Greer for "Political Strategy 16

On or about March 26, 2010, Robert Kirkland appears to have disseminated communications via a website, www.ivoteconservative.com. Robert K. Response at 4. The home page of the website

February 7, 2010. Greer Aff. ¶4: Robert K. Aff. ¶5.

Consulting" on February 5, 2010. Greer states that he has bad no involvement with the Committee

or any of its activities since January 31, 2010; Robert Kirkland states his own involvement ouded on

¹ Kirkland lost the primary election, placing second with 24% of the vote. The winning candidate garnered a 48% share.

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- 1 contained the following header: "Ron Kirkland (.) Conservative for Congress(.) Join a
- 2 Proven-Trusted-Conservative fighting for Tennessee values." www.ivoteconservative.com. See
- 3 Attachment 1. Robert Kirkland's first public communication in support of Ronald appears to have
- 4 been a March 26, 2010 radio advertisement that contained, in part, the following text: "That's why
- 5 Ronald Kirkland is running for Congress. Proven. Tested. Conservative." Complaint at 2.² The
- 6 advertisement ends with the following disclaimer: "Rebert Kirkland is responsible for the content of
- 7 this advertisement. Paid for by Robert Kirkland and not authorized by any candidate or candidate
- 8 committee. Go to www.ivateconservative.com." Id. Submiquent to these communications, Robert
- 9 Kirkland appears to have paid for a campaign mailer and television ads in support of his brother's
- 10 candidacy in April 2010, as well as Ron Kirkland yard signs in mid-May 2010, and newspaper ads
- starting in late May 2010. See, e.g., Robert K. Response at 4. The mailer, like Robert Kirkland's
- website, prominently displays the phrase "proven, trusted, conservative." Id. at Exhibit 7 (See
- 13 Attachment 2). Although we do not have copies of the yard signs or the newspaper ads, we have
- scripts or copies of what appear to be three television ads. As of August 5, 2010 (the date of the
- primary election), Robert Kirkland has reported spending \$1,017,136.29 in independent expenditures
- in support of Renalti Kirkland, which include payments for research, polling, political and media
- 17 commulting, mailers, website design, legal fees, and television, radio, and newspaper advertising.

² The six-page complaint did not include numbered pages; accordingly, we have inserted our own numbers. Also, although the complaint suggests that the ad may have been broadcast as early as March 22, 2010, the responses and FEC filings clarify that March 26 was the first date. See, e.g., Robert Kirkland Miscellaneous Report dated April 5, 2010; Robert K. Aff. ¶7.

The complaint quotes from the script of a television ad that allegedly began airing on April 6, 2010. Complaint at 2. The script twice uses the word "trust" but does not lactude the phrase "proven, trusted, conservative." We were able to download theme 36-accord video clips from Robert Kirkland's website, which appears to have ceased operations shortly after the August 5 primary election. One video clip commiss the same text as the script included in the complaint; the second video ends with the statement "Dr. Ron Kirkland, a true conservative for Congress," but does not contain the above phrase; the third video clip contains statements such as "[Ron Kirkland is] uniquely qualified to run for Congress" but does not contain the phrase.

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1 Although the Committee did not provide a copy of any of its communications with its 2 response, the candidate appears to have subsequently posted various ads on the Internet using the 3 same or similar slogans and themes as those contained in Robert Kirkland's communications. See http://www.youtube.com/user/DrRonKirkland (last visited 9/23/10). One ad, running for one 4 5 minute and 41 seconds, entitled "Who is Ron Kirkland?" (posted on 4/21/10), ends with the 6 candidate stating "These ideas are proven, trusted, conservative, and so am I. I'm Ron Kirkland and I appendiate your support." A 30-second ad entitled "Ron Kirkland Tennessee" (posted 7 5/17/10) contains short clips of a speaker saying "Proven" (word "PROVEN" on screen), then a 8 9 second speaker saying "Trusted" (word "TRUSTED" on screen), then the first speaker saying 10 "Conservative" (word "CONSERVATIVE" on screen). A third ad, also 30 seconds, entitled 11 "Kirkland Responds" (posted 6/15/10), ends with the candidate stating "Our Tennessee values 12 are proven, trusted, conservative, and so am I. You can count on me to fight for you in Washington."4 13 14 The complaint alleges that the respondents have violated the Act by making and receiving in-15 kind contributions in excess of the Act's limitations. Specifically, the complaint alleges that the 16 website, television ads, and radio ads paid for by Robert Kirkland constituted coordinated 17 communications under 11 C.F.R. § 109.21 based on (1) their use of the Committee's campaiga 18 "slogan" ("proven, trustad, conservative"), (2) statements made by the campaign manager showing 19 that Robert Kirkland suggested making expenditures in support of his brother and that the 20 Committee assented to the suggestion, (3) the "close familial tie" between Ronald and Robert 21 Kirkland, and (4) Robert Kirkland's enthusiastic support of his brother's candidacy, as demonstrated

⁴ In addition, the complaint included an email communication from the candidate, dated April 4, 2010, as well as a copy of the home page on the Committee's website. See Attachments 3-4.

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- by a February 6, 2010 fundraising email he sent. The complaint alleges that the communications are
- 2 subject to in-kind contribution limits far lower than the amounts reported on Robert Kirkland's Form
- 3 5.5 The complaint further alleges that the disbursements should have been reported as in-kind
- 4 contributions.
- In denying the allegations, Robert Kirkland's response makes the following arguments,
 - supported by affidavits from Kirkland and his independent expenditure consultants Brad Greer and

Terry Benham:

- The fact that Robert Kirkland is Ronald Kirkland's brother is legally irrelevant to a coordination analysis. The affidavits each deny that Ronald Kirkland or anyone associated with his campaign was materially involved in any of the independent expenditures, or that there has been any request or suggestion or substantial discussion, as defined at 11 C.F.R. § 109.21(d).
- Robert Kirkland avers that he ceased all involvement with the Kirkland campaign and consulted with counsel before making any independent expenditures in order to ensure compliance with the law. Robert K. Aff. ¶¶5, 6.
- Brad Greer terminated his involvement with the campaign on January 31, 2010, a day before he started his consulting work for Robert Kirkland. Greer Aff. ¶¶4,5.
- Although Ronald Kirkland's campaign manager, Brent Leatherwood, was quoted in a
 news article (Att. 8 of the complaint) as having knowledge of Robert Kirkland's
 independent expenditure effort, this knowledge stemmed from the public broadcast of the
 radio ads.
- No common vendors or former surployers were involved with the independent expanditures: Former volunteers Robert Kirkland and Brad Greor are not former employees under the regulatory definition.
- Robert Kirkland's use of the phrase "proven, trusted, conservativo" in some of his independent expenditures does not satisfy the republication standard because the language is too generic and general.

The Committee's FEC reports show that Robert Kirkland made a \$2,400 ptimary election contribution and a \$2,400 general election contribution, both an Jamesry 14, 2010. Accordingly, he had reached his 2010 cycle contribution limit to the Committee before he started making expenditures in support of Ronald Kirkland.

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•	The phrase "proven, trusted, conservative" was based on a biography posted on the
	Kirkland campaign's website that Bred Greer read and decided to use as a prominen
	theme in the independent expanditures.

The Committee's response, supported by affidavits from candidate Ronald Kirkland, his

- 6 "general consultant" Joel McElhannon, and his campaign manager Brent Leatherwood, makes the
- 7 same or similar arguments as in Robert Kirkland's response, but provides further details on certain
- 8 points:

- McElhannon developed the language "proven, trusted, conservative" for use in the Committee's communications and has used that language in previous campaigns. McElhannon Aff. ¶17.
- The Committee first used the phrase "proven, trusted, conservative" in a February 26, 2010 fundraising letter (one month before Robert Kirkland's first independent expenditure) and on the Committee's website on April 5, 2010.
- McElhannon states that he has never met or spoken to Robert Kirkland, that he has kad no material involvement in any of Robert Kirkland's acis, and that he never conveyed any campaign plans, projects, activities or needs "for the purpose of producing or distributing the communications." McElhannar Aff. ¶5, 9, 10.

B. Legal Analysis

1. Overview

The central issue in this matter is whether advertisements paid for by Robert Kirkland in support of candidate Romaid Kirkland were, in fact, independent expenditures, as reported, or whether they were coordinated with the Kirkland Committee.⁷ The central allegation regarding

Robert Kirkland's response also claims that the complaint is defective because the complainant failed to include his arkinens. See 11 C.F.R. § 111.4(b)(1). However, the envelope containing the complaint included the address.

That Robert and Ronald Kirkland are brothers and that Robert previously sent a fundraising email are irrelevant since those same facts equally support Robert Kirkland's desire to undertake an independent expenditure effort to assist his brother's candidacy. In addition, it appears that the Committee's response, including the affidavit of campaign manager Brent Leatherwood, is sufficient to rebut the alleged coordination based on press statements reportedly made by him. On April 8, 2016, Leatherwood reportedly stated that "[e]arly en, Robert [Kirkland] decided he wanted to do an independent expenditure effort" in order to "level the playing field," but he also noted that the brothers had cut off all communication and that the campaign had "no knowledge of what is being done there and what [Robert] is planning to do." Att. 8 of Complaint. The Committee contends that Leatherwood had no

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coordination is based on Robert Kirkland's use of what appears to have become a key theme or

2 slogan in the candidate's campaign ("proven, trusted, conservative"). While the individual words

are generic, and the use of the phrase is not unique to the Kirkland campaign, its prominent use in

4 both Robert Kirkland's and the Committee's communications materially reinforced the campaign's

message in a shorthand manner such that if coordinated, Robert Kirkland's communications would

6 appear to be in-kind contributions.

While Rahert Kirkland's response provides an explanation for how his communications came to prominently are the same or similar slogan as the Committee's communications, that explanation does not appear to be supported by the available information. Greer states that he "decided to use [the] phrase as a prominent theme" in Robert Kirkland's expenditures based on his reading of a biography of Ronald Kirkland that was posted on the Committee's website. Greer Aff. ¶16. See also Robert K. Aff. ¶16. Robert Kirkland's response did not provide a copy of the biography. However, none of the words, "proven, trusted, conservative," appear, alone or in conjunction, in the biography posted on the Committee's website as of April 13, 2010. See Attachment 5. Indeed, Joel McElhannon states that the Committee's first use of the phrase on the campaign websits was not until April 5, 2010. McEinsannon Aff. ¶16. Aucording to McElhannon, the Committee initially used the phrase "in a campaign fundraising letter on February 26, 2010." Id. at ¶15. The Committee did not provide a copy of the letter, or indicate whether a copy had been sent

knowledge of the independent expenditure effort before Robert Kirkland started airing radio ads in late March, and Leztherwood states in his affidure that its had not material involvement in decisions concerning entry of Kirkland's ads and did not convey any campaign plans, projects, activities or needs to Kirkland or his agents. Committee Response at 5; Leatherwood Aff. ¶77, 8.

BRobert Kirkland's website communications would be appear to be exempt from being treated as "contributions" under the Act, even if they were coordinated with the Committee. Sun 11 C.F.R. § 190.94 (as individual's uncompensated personal services related to Internet setivities, or his or her use of equipment or services for uncompensated Internet activities, is not a contribution whether that individual is "acting independently or in coordination with any candidate [or] authorized committee").

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- 2 the two sets of communications came to include the same or similar language.
- 3 Under the Federal Election Campaign Act of 1971, as amended ("Act"), no person may make
- 4 a contribution, including an in-kind contribution, to a candidate and his or her authorized political
- 5 committee with respect to any election for Federal office which, in the aggregate, exceeds \$2,400.
- 6 2 U.S.C. § 441a(a)(1)(A); see 2 U.S.C. § 431(8)(a)(i), 11 C.F.R. § 100.52(d)(1). The Act defines in-
- 7 kind contributions as, inter alia, expenditures by any person "in cooperation, consultation, or
- 8 connert, with, or at the request or suggestion of, a candidate, his authorized political committees, or
- 9 their agents " 2 U.S.C. § 441a(a)(7)(B)(i).

A communication is coordinated with a candidate, an authorized committee, a political party

committee, or agent thereof if it meets a three-part test: (1) payment by a third party, (2) satisfaction

12 of one of four "content" standards, and (3) satisfaction of one of six "conduct" standards. See

13 11 C.F.R. § 109.21. In this matter, the first prong of the coordinated communication test is satisfied

because Robert Kirkland is a third-party payor. The second prong of the test, the content standard,

15 also appears to be satisfied. Since the advertisements were reported as independent expenditures, it

seems reasonable to infer at this juncture that they either contained express advocacy or featured a

cluarly identified cambidate and were disseminated in the caudidate's jurisdiction within 90 days of

18 the election. 11 C.F.R. §§ 190.26, £09.21(c)(3) and (4)(i). Thus, whether or not Robert Kirkland's

⁹ Robert Kirkland's independent expenditure filings indicate that the bulk of his spending occurred within the 90-day window, which began on May 7, 2010.

The D.C. Circuit found aspects of the content and conduct prongs of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) invalid but did not enjoin the Commission from enforcing them. See Shays v. F.E.C., 528 F.3d 914 (D.C. Cir. 2008) ("Shays III Appeal"). On August 26, 2010, in response to the Shays III Appeal, the Commission approved the Fund Rules and Explanation and Institutation for Coordinated Con americations ("Flual Rules"). The Final Rules, which go into effect on December 1, 2010, add a new standard to the content prong of the coordination rules to cover public communications that are the functional equivalent of express advocacy. The Final Rules do not after the conduct prong of the coordination rules, but provide further jurification for retaining the 120-day time period in the common vendor and former employee conduct standards.

1 communications were independent expenditures (or disbursements, if they did not contain express

2 advocacy) or coordinated communications hinges on an analysis of the conduct prong of the test.

2. Common Vendor

One way the conduct prong may be satisfied is if (1) the person paying for the communication contracts with or employs a commercial vendor to create, produce or distribute the communication; (2) that commercial vendor has provided any of the enumerated services to the cardidate who is clearly identified in the communication during the psevious 120 days; and (3) that commercial version uses or conveys to the person paying for the communication information about the campaign plans, projects, activities or needs of the clearly identified candidate, and that information is material to the creation, production or distribution of the communication (the "common vendor" standard). See 11 C.F.R. § 109.21(d)(4).

Regarding the first element, the responses acknowledge that Robert Kirkland, a third-party payor, contracted with Greer to create, produce and distribute his communications. See 11 C.F.R. §§ 109.21(d)(4)(i) and 116.1(c). "Commercial vendor" means any person providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services. 11 C.F.R. § 116.1(c). Robert Kirkland's response states that Grear "is a political consultant...." and various news reports describe Greer as a "political consultant" or "political strategist" and identify past campaigns on which he has worked. See, e.g., John McArdle, "Brotherly Love and Spending Limits" CQ-ROLL CALL, April 13, 2010 ("Greer... has worked on several campaigns...."). Thus, Brad Greer appears to be a person

¹⁰ In common vendor cases, the candidate, or his or her authorized committee, does not receive or accept an in-kind contribution unless they engage in conduct described in 1½ C.F.R. § 109.21(d)(1)-(3). See 11 C.F.R. § 109.21(b)(2).

¹¹ The article noted that Greer had served as a volunteer to the Kirkland campaign and included the following quote concerning his relationship to the Kirklands: "I have known the Kirklands for years and years.... When Ron

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- 1 whose usual and normal business involves providing political consulting services, leaving open the
- 2 question whether he provided those services to the Committee. Given his background, and the
- 3 description, though vague, of his services to the Committee, it appears that Greer may have provided
- 4 one or more services enumerated at 11 C.F.R. § 109.21(d)(4)(ii) to the candidate during the previous
- 5 120 days. 12 See Greer Aff. ¶5 (activities for campaign included advising the candidate and making
- 6 recommendations on the hiring of campaign staff).

The affidavits do not provide specific information as to whether Greer advised the candidate or the Committee about media strategy or future communications, os whether he participated in discussions or made decisions concerning these subject areas. McElhannon, the Committee's general consultant who had used the phrase in previous campaigns, and was the one who decided to use it prominently in Ron Kirkland's campaign, states in his affidavit that he contracted with the Committee on January 1, 2010, that he never met or spoke to Robert Kirkland, and that he never conveyed the Committee's campaign plans, projects, activities or needs to Robert Kirkland or anyone acting on his behalf "for the purpose of producing or distributing communications." McElhannon Aff. ¶3, 5, 10. As to Greer, McElhannon does not specifically say he never talked with Greer, or that he never conveyed to Greer the Committee's campaign plans, projects, activities or needs; he early says that he did not do ne "for the purpose of producing or distributing communicatione." However, the summon vendor standard does not require that the conveyor of the information to the common vendor know that the cammon

Kirkland announced he was going to run, I did help in an initial phase with some of the basics. . . . [That work involved] advising about campaign structure, recommending to Ron Kirkland people he might need to meet and speak with and the ways campaigns and am."

Those services include, *inter alia*: Development of media strategy; developing the content of a public communication; producing a public communication; selecting personnel, contractors, or subcontractors; or consulting or utherwise providing political or media advice. 11 C.F.R. § 109.21(d)(4)(d).

vendor intends to use it for a future communication. Rather, the conveyance language in the standard is followed by the requirement that the information conveyed be material to a later

3 communication.

The fact that Greer may have provided the enumerated services as a volunteer would not appear to preclude his qualifying as a "common vendor." While the Commission considered, but determined next to, interpret the former employee (or independent contractor) standard at section 109.21(d)(5) to enver volunteers, that was based on its view that the use of the word 'employee' in section 214(c)(3) of BCRA¹³ was "a significant indication of Congressional intent that the regulations be limited to individuals who were in some way employed by the candidate's campaign or political party committee, either directly or as an independent contractor." Explanation & Justification ("E&J"), 68 Fed. Reg. 421, 439 (2003). While we have not located any coordination cases involving volunteer common vendors, the Commission has not similarly expressly limited the term "common vendor" as excluding volunteers, and the regulation does not state that the political committee, like the payor of the communications, must have employed or contracted with a commercial vendor.

As for the third element of the common vendor standard, we have no information at this time that Greer used or conveyed to Robert Kirkland information about the Kirkland campaign plans, projects, activities or needs which was meterial to the creation, production or distribution of the communication. 11 C.F.R. § 109.21(d)(4)(iii). However, in other common vendor cases where the Commission had little or no information as to this element, the Commission has made reason to believe findings where the respondents submitted limited responses with no affidavits, see, e.g., MUR 5502 (Martinez), or submitted affidavits that did not squarely address the issues. See, e.g.,

The reference to section 214(c)(3) of BCRA (Bipartisan Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002)) is included in a finotnesse to 2 U.S.C. § 461a(a)(7)(B)(ii).

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- 1 MUR 5598 (Swallow), MUR 5415 (Club for Growth). In each of these cases, the Commission
- 2 approved an investigation to determine whether the use or exchange of information occurred as
- described in 11 C.F.R. § 109.21(d)(4)(iii), and the same approach appears warranted here.

3. Request or Suggestion/Material Involvement/Substantial Discussion

The conduct prong may also be satisfied when, inter alia, (1) a communication is created, produced or distributed at the request or suggestion of the candidate or his or her authorized committee, or at the suggestion of the person paying for the communication, and the condidate or his or her committee assents to that suggestion; (2) the candidate or his or her authorized committee is materially involved in certain decisions regarding the communication; or (3) the communication is created, produced or distributed after one or more substantial discussions about the communication between the candidate and his or her authorized committee and the payor and his or her agents.

11 C.F.R. § 109.21(d)(1)-(3). If Greer, or both Robert Kirkland and Greer, were Committee "agents," then it is possible their conversations with each other – particularly around the time they entered into the independent expenditure contract but before leaving the campaign – may satisfy one or more of these standards of the conduct prong.

The Commission's regulations state that "any reference [in the coordination provisions] to a candidate, or a candidate's authorized committee, . . . includes an agent thereof." 11 C.F.R. § 109.20(a). It appears that the Commission intended that both employees and volunteers can qualify as agents. See Revised E&J for "Definitions of 'Agent' for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures," 71 Fed. Reg. 4975, 4977-78 (2006) (Commission's post-BCRA definitions of agent capture, as opposed to the pre-BRCA rules, a larger set of individuals, including volunteers, and "create the appropriate incentives

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- 1 for candidates . . . to ensure that their employees and volunteers are familiar with, and comply with,
- 2 BCRA's soft money and coordination provisions").
- An "agent" is defined at 11 C.F.R. § 109.3(b) as any person who has actual authority, either
- 4 express or implied, to engage in certain enumerated activities on behalf of a federal candidate,
- 5 including, inter alia:
 - (1) To request or suggest that a communication be created, produced, or distributed.
 - (2) To make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c).
 - (3) To request or suggest that any other person create, produce, or distribute any communication.
 - (4) To be materially involved in decisions regarding:
 - (i) The content of the communication;
 - (ii) The intended audience for the communication;
 - (iii) The means or mode of the communication;
 - (iv) The specific media outlet used for the communication;
 - (v) The timing or frequency of the communication; or
 - (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, ar satellits.

20 The responses and affidavits provide no information regarding either Robert Kirkland's or

- 21 Greer's authority as committee volunteers, and only general descriptions of the activities that
- 22 Kirkland and Greer engaged in on behalf of the Committee; Kirkland states that his activities
- 23 included advising the campaign "on various matters" and Green states that he "advis[ed] the
- 24 candidate," without describing the nature of his advice. Robert K. Aff. [4; Greer Aff. [3]. Given that
- 25 Greer was an experienced political committant, it is possible that the candidate or others in the
- 26 campaign gave him actual authority, express or implied, to engage in one or more of the activities
- 27 enumerated at 11 C.F.R. § 109.3(b) that define an "agent" for purposes of coordination. Without
- 28 more specific information about what Greer's activities were with the campaign, we cannot
- 29 determine whether this was the case. It is also possible that Robert Kirkland may have been an agent
- 30 by virtue of authority given to him in his advisory role in or around January 2010.

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Robert Kirkland and Greer likely began discussing Kirkland's plan to make independent expenditures in January 2010 while they were both still volunteering with the campaign, since they entered into a contract on January 21, 2010, for Greer to serve as Kirkland's independent expenditure consultant. Moreover, Robert Kirkland states that he consulted an unidentified "political advisor" in January 2010 – who may have been Greer – in determining the "feasibility" of his making independent expenditures. Robert K. Aff. ¶4. Such consultation might also have included plans for communications using the Committee's planned phrase, which may have been sufficient to satisfy the request or suggestion, substantial discussion, or material involvement, elements. With regard to material involvement, the E&J states at 68 Fed. Reg. at 434:

[I]t is not necessary that the involvement of the candidate [or candidate's agent] ... be traced directly to one specific communication [by the third-party spender]. Rather, a candidate's [or candidate's agent's] ... involvement is material to a decision reparting a particular communication if that communication is one dia number of communications and the candidate [or candidate's agent] ... was materially involved in decisions regarding the strategy for those communications. For example, if a candidate [or candidate's agent] is materially involved in a decision about the content or timing of a 10-part advertising campaign, then each of the 10 communications is coordinated without the need for further inquiry into the decisions regarding each individual ad on its own.

The affidavits do not address the timing, scope, content, or extent of the discussions between Robert Kirkland and Greer parrounding the signing of their contract, and Kirkland did not submit a copy of the contract, which might have shed more light on these nastters.

Accordingly, there is reason to investigate whether Greer or Kirkland were "agents" of the Committee and, if so, whether their contacts with each other while acting as agents satisfied one or more conduct standards. See MUR 5440 (The Media Fund) (Commission authorized investigation to determine whether individual was an "agent" of national party committee for purposes of coordination, where that individual served on executive committee of party while directing activities of organization that paid for ads satisfying applicable standards of content

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- prong); see also MUR 6056 (Protect Colorado Jobs, et al.) (OGC recommended Commission
- 2 find reason to believe that organization may have coordinated mailer with campaign and
- 3 authorize investigation focusing on, inter alia, whether individual who may have provided funds
- 4 to organization and served as legal advisor to campaign, had actual authority to engage in
- 5 activities on behalf of the campaign; Commission voted 3-3 on reason to believe
- 6 recommendations and 6-0 to close file). 14

4. Canclusion

8 Based on the foregoing, we recommend that the Commission find reason to believe that

- 9 Robert E. Kirkland violated 2 U.S.C. § 441a(a)(1)(A) by making excessive in-kind contributions to
- 10 the Committee in the form of coordinated expenditures, and that the Committee and Ronald H.
- 11 Kirkland, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b) by knowingly
- 12 accepting and failing to disclose excessive in-kind contributions. Given the recommended
- investigation, we recommend that the Commission take no action at this time as to the candidate,
- 14 Ronald H. Kirkland, in his personal capacity.

15 III. PROPOSED INVESTIGATION

An investigation to determine whether Robert Kirkland coordinated the expenditures at

17 issue with the Committee would focus on whether Greer was a common vendor, and whether

18 information from the Committee was used or conveyed by him that was material to Robert

¹⁴ The complaint also alleged that Robert Kirkland made excessive contributions to the Kirkland Committee by coordinating emmatting emma

First General Counsel's Report MUR 6277 (Kirkland for Congress) Page 18 of 19

Kirk	and's communications in support of his brother's candidacy.
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	·
In ti	ne event that further investigation becomes necessary, we request that the Commission
auth	orize the use of compulsory process in this matter, including the issuance of appropriate
	ramaturies, document submonus, and deposition subponus, as necessary, subject to
	whation on a 48-hour tally.
IV.	RECOMMENDATIONS
	1. Find reason to believe that Robert E. Kirkland violated 2 U.S.C. § 441a(a)(1)(A).
	 Find reason to believe that Kirkland for Congress and Ronald H. Kirkland, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b).
	 Find reason to believe that Kirkland for Congress and Ronald H. Kirkland, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b). Take no action at this three as to Ronald H. Kirkland in his personal capacity.

· 37 .

1 2 3	5.	Authorize the use of compulsory process in this matter.
4	6.	Approve the appropriate letters.
5 6		Christopher Hughey
		Acting General Counsel
7 8 9		_
	.7	
10	X. L	A same and a same a
11	Zyje.	New 2 1 2010 Survey
12 13	Date '	Susan L. Lebeaux
14		Acting Deputy Associate General Counsel for Enforcement
15		for Emoleciment
16		
17		
18		Kit 108
19		Peter G. Blumberg
20		Assistant General Counsel
21		
22		
23		Thomas J. Andersey
24 25		Thomas I Andrews
25 26		Attorney
20 27		Attorney
28		
29	Attachme	nts:
30		Copy of home page of the Robert Kirkland website www.ivoteconservative.com
31		Copy of Robert Kirkland mailer
32		Copy of April 4, 2010 email from Ronald Kirkland
33	4.	Copy of home page of Committee website www.votekirkland.com
34		Copy of candidate biography on Committee website
35	6.	

Welcome Commercials

KIRKLAND CONSERVATIVE FOR CONGRESS DEBUGN TRUSTED - CONSERVATIVE

PROTEIL

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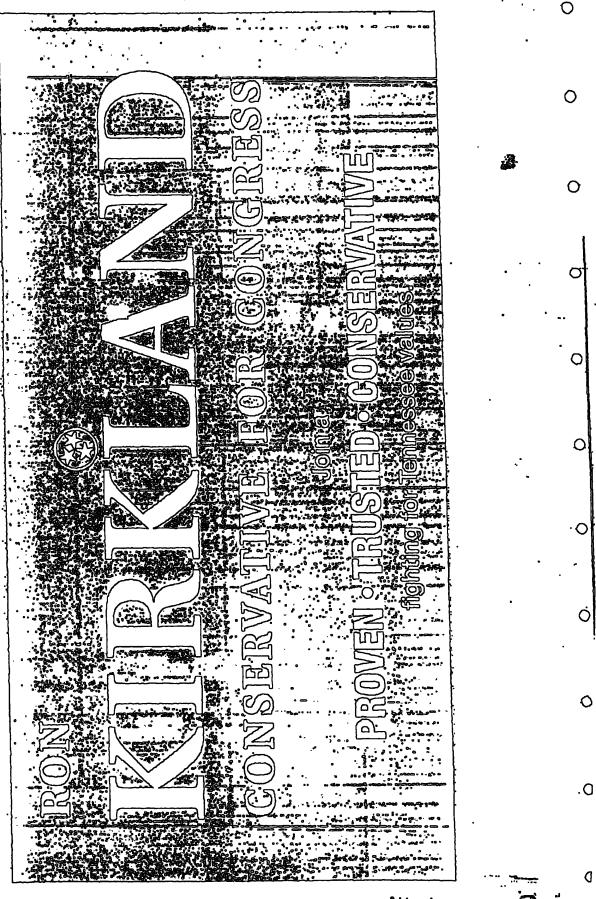
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Attachment ______ of ______

KIRKLAND CONGRESS

PROVEN

- Faithful Huebend of 41 Years, Father of Four and Ordained Deacon
- · Earned the Honor of Being Selected One of "America's Top Physicians"
- Veteren Who Served the United States in Army Intelligence

TRUSTED

- Elected by Colleagues to Grair the State's Largest Private Multi-Specialty Clinic
- Business-Minded Doctor Who Has Created Jobs
- Served as Chairman of UT's National Alumni Association

CONSERVATIVE

- Pro-Life, Pro-Traditional Marriage, Pro-Right to Keep and Bear Arms
- Supports Free Markets and Less Government
- Strongly Supports/Defends Our Constitution

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Attachment 2 of 2

Forwarded message
From: Br. Ren Kirkland Confevetekirkland com
Date: Sun; Apr 4, 2010 at 2:15 FM
Subject: Haster Message from Ron Kirkland



2 Corinthians 3:17 - "Now the Spirit is the Lord and where the Spirit of the Lord is, there is Liberty."

Priends:

For many of us, this weekend is an occasion to gather with family and friends. It is a time to remember the blessings in the part investigation of the securities undo or our behalf.

Haster is a time of renewed hope - for our country, our level ones, and our Creator. Because of this, we can treat each day as a new beginning.

Have a wonderful Sunday and a blossed Baster.

Con Culeup

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Attachment 3
Page \(\sqrt{1} \) of \(\frac{2}{2} \)

INVEST IN RON

This message was sent from Dr. Ron Kirldand to. It was sent from: Ron Kirldand, P. O. Box: 12235, Jackson, TB 38308. You can modify/update your subscription via the link below.

10044285581

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Attachment 3
Page 2 of 2

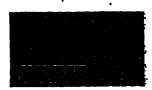
SKIP TO MAIN SITE	Make a Difference and Support Ron With a Financial Contribution or By Volunteering.
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ABOUT DR. RON KIRKLAND



UNMATCHED LIFE EXPERIENCE.

UNIQUELY QUALIFIED TO SERVE TENNESSEE.

Rom Kindand to a litelong Tennessoan. Born and resed in Union City, he servedies a Sergiant in the US Army, including a tour in Viotnem as a counterintaligence agent.

Rom extract his undergraduate degree from the University of Tennessee at Martin and his M.O. from the interesting Tennessee Hautit Science Contex th Rompins, where he received the initial public Senter August, in \$100,50 m esemblant as fine-raive MBA from the University of Tennessee at Knowlife.

A gentificing physicism for 25 years, Cir. Kirigand in the Imageplate past Chairmen of the Board of The Jackson Clinic, a multispecially medical given comprising over 120 physicisms in 14 West Tennesses (segments. Twice selected by his poers as one of the "Best Doctors in America," he has also been named one of "America's Top Physicisms". Ron served as Chair of the Board of American Medical Group Association beset in Alexandria, Virginia, in 2006.

In addition to his musical photology Ross is also an action excessionly tender. Seems of his many roles have included President of the Linkerson Rober Clair and President of the University of Tendencese Helipant Alexandrian. He has surved on the University of Tennesson (Knowling Athletic Beard and on the bounds of the Mediana County Chamber of Comments and the Jackson Arts Council. One of his feverite volunteer activities was conching youth soccer and bestetlast for 10 years.

Ron and his wife of 41 years, Carol, settled in Jackson to raise their family. They are the proud perents of four children and three grandchildren. The Kirklands are active members of First Beptist Church in Jackson, where Ron serves as a descen.

The 8th Congressional Business most driving Terressee and some of Militie Terressee. The District stretches from the suburbs of Memphis to the suburbs of Nashville. The 8th District will likely be a businesseems congressed and provided in 1810.

H. Mar. ... Alla.

INVEST IN RON

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Make a Officence and Support Non-With a Financial Contribution or By Valuefeering,



STAY INFORMED

Receive Ernali Updates From the Kirkland Committee.

NAME	
COUNTY	
EMAIL	

Join Ron in Supporting the National Movement to Return Our Country to ConsStational Conservation



Repeal It!

Join Ron in Piedging to Rescue America from Oberna's Government Run Health Care.

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Have a question for Ron about an issue before Congress or his views on an issue

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NEWS

Kirkland Unveils New Website

4/13/2010

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Jackson physician's compaign website has been completely redesigned, sets the standard for infermation and innovation in District 8 race

JACKSON — Dr. Ron Kizketti, the conservative Regulation for Congress, unveiled his ear compalgo website in Jackson today. The site, www.votetiritiand.com, sets a new stendard for those running in Tennessen's Eighth U.S. House district.

The sits contains a weath of fillementer about St. Williams still his views on the imperium issues feating our country, it mightights the ways we can fight book against the restibilities the against threatening and offices a summer of evenues for clizens to stay engaged and updated on comparing events and important dates.

"I am thritied to introduce the most advanced, 'one-step' online resource in this race for Congress,"
Dr. Kintignid said. "I believe this site will allow voters concerned about the direction of our country a chance to get plugged in and make a difference."

He-continued, "This new website continues our push to fight back against Washington's outrageous attempts to surfice our IVER. Whichire it is regulating our lives or talking us who to vote for, Americans are fluid up. This exclusion will be greend good in Tennesson's critice demonstraty for saling the Mathemy Institute tennessys to ordargin."

Votelidiged-arm is sure the meet user-thankly energoign also in Middle and West Tenassean. Mith its randpalanch sens, each sulfity, and the interaction it alians with the candidate, the website-actable standard as a also that allow voters to ask questions and engage. While other compalges just tell you what they went you to know and tell you what to do, Dr. Kirdand's also continues his jong tradition of listening, offering solutions, and answering questions from voters.

Dr. Ron Kirkland is the curservalled Republican candidate for the U.S. Congress in Tennessor's Eigen Congressions Davids, ine is a physican with leve in Jackson, Tunnessors, Laten mant adverting adapting at our namerobalic eventualistical case.

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INVEST IN RON

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Make a Difference and Support Ron
With a Financial Contribution or By



STAY INFORMED

Receive Email Updates From the 19rishand Campaign.

NAME	
COUNTY	
EMAIL	•

Join Ron in Supporting the National Movement to Return Our Country to Constitutional Conservation



Repeal III

Join Ron in Piedging to Rescue America from Obama's Government Run Health Care.



Have a question for Ron about an issue before Congress or his views on an issue

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Page 2

of <u>2</u>

http://www.votekirkland.com/newsDetail.aspx?newsID=9239